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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ——

E. I. DU PONT DE NEMOURS & COMPANY,
PETITIONER
v.
LYLES & LANG CONSTRUCTION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of E. I. du Pont de Nemours & Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on February 2, 1955.[1]

[1] This litigation arises under a contract between respondent, as a subcontractor, and petitioner, the holder of a contract with the United States Atomic Energy Commission, for the construction of the Savannah River project. The Solicitor General is appearing on behalf of petitioner pursuant to the terms of the prime contract which provides that the Government would assume and carry on the defense of all "claims, suits or legal proceedings" asserted or instituted against petitioner on account of acts or omissions in the performance of the contract and that the Government would

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of South Carolina (1 R. 1–37) is not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (App., *infra,* pp. 1a–32a) is reported at 219 F. 2d 328.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1955 (App. *infra,* pp. 32a–33a). By order of the Chief Justice dated April 30, 1955, the time for filing a petition for a writ of certiorari was extended to and including May 11, 1955 (App., *infra,* p. 33a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the administrative machinery for the final settlement of disputes of fact provided in the standard form disputes clause of a Gov-

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pay and discharge all final judgments obtained against petitioner in such litigation (App. *infra,* p. 6a).

In addition, the Federal Government is the one primarily interested in the questions presented in this petition, which are believed to affect an important segment of governmental activity. Under R. S. 359, 5 U. S. C. 309, and R. S. 367, 5 U. S. C. 316, the Solicitor General may appear in any case in which the United States is interested and attend to the interests of the United States in a suit pending in this Court. It is for that reason that it has not been deemed necessary to pursue in this Court the denial by the courts below of the application of the United States to join and intervene in this litigation.

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ernment construction subcontract must be exhausted before judicial review may be had of disputes—on termination of the subcontract pursuant to its terms—relating to such matters as costs of construction, reasonableness of expenditures, the value of land and buildings, and the meaning of overhead under accepted accounting principles.

2. Whether a joint venture agreement to carry out the subcontract—under which all property used in performing the subcontract was beneficially owned by the joint venture, all matters of general policy in the performance of the subcontract were to be determined by the members of the joint venture, and all profits and losses arising out of the performance of the subcontract would inure to the joint venture—constituted an assignment in violation of the standard form provision prohibiting assignment of any interest in the subcontract without prior written approval.

3. Whether a Government prime contractor may, without the consent of the Government, effectively waive a subcontractor's compliance with the standard form provisions of the subcontract, whose incorporation is required by the Government for the protection of governmental interests.[2]

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[2] Although we do not urge it as an independent reason for granting the writ, one further general question is raised by the decision below, *i. e.*, whether the court erred in failing to

CONTRACT PROVISIONS INVOLVED

The contract between respondent [referred to in the contract as "Operator"] and petitioner [referred to in the contract as "du Pont"] provides, in pertinent part, as follows (3 R. 561–571):

> SECTION 11. *Disputes.*—Except as otherwise specifically provided in this Agreement, all disputes concerning questions of fact arising under this Agreement shall be decided by the Manager of the [Atomic Energy] Commission's Savannah River Operations Office subject to written appeal by the Operator within thirty (30) days to the [Atomic Energy] Commission, whose decision or that of its duly authorized representative shall be final and conclusive upon the parties hereto. In the meantime the Operator shall diligently proceed with the work as directed. Appeals to the [Atomic Energy] Commission under this

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apply local law in a diversity case with respect to the question of allowable interest. Under the law of South Carolina where this action was brought, interest is not recoverable on an unliquidated account. *Leaphart* v. *National Surety Co.*, 167 S. C. 327, 166 S. E. 415. The court below found that respondent's claim was not liquidated within the meaning of the South Carolina decisions and that the district court had erred in awarding some $70,000 as interest at the legal rate but held nevertheless, as a matter of federal law without any reliance upon South Carolina law, that respondent should be awarded interest at the going market rate as an element of fair compensation (App. *infra*, pp. 28a–31a). This ruling, we submit, is in conflict with this Court's decision in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487.

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Section shall be submitted through du Pont.

* * * * *

SECTION 13. *No Assignment of Right.*— Except as provided in the second paragraph of this Section, the Operator shall have no right, authority or power to sell, mortgage, assign, or parcel out this Agreement or any interest therein, nor any right, power or authority to allow or permit any other person or party to have any interest in or use any part of the facility or space covered by this Agreement for any purpose whatsoever, without the written approval of du Pont; it being the purpose and spirit of this Agreement to grant said privilege solely to the Operator and neither directly nor indirectly to any other person or party. Neither this Agreement nor any interest created thereby, shall pass to any trustee or receiver in bankruptcy or to any other receiver or assignee for the benefit of creditors, or to any other person or otherwise, by operation of law. In the event approval is granted by du Pont for any assignment of rights, the Operator shall be responsible to du Pont for the assigned portion to the same extent and in the same manner as for the portion operated by him direct. * * *

STATEMENT

This litigation arises out of the termination of a contract between respondent Lyles & Lang Con-

struction Company (Lyles & Lang), a subcontractor, and petitioner E. I. du Pont de Nemours & Company (du Pont), the holder of a prime contract with the United States Atomic Energy Commission (AEC). In this action, Lyles & Lang seeks to recover the compensation provided for under the subcontract in the event of termination and damages for an alleged breach (1 R. 37).

1. By letter contract with AEC of October 11, 1950 (3 R. 613), du Pont undertook, for a fee of $1.00, to design, construct and operate for AEC the Savannah River project.[3] It was authorized to subcontract portions of the work, any subcontracts in excess of $10,000 being subject to AEC's written approval. On August 28, 1951, pursuant to the terms of the prime contract, du Pont awarded a subcontract to Lyles & Lang for the construction and operation of dormitories to provide temporary housing for 7,500 workers (3 R. 580). The subcontract, executed on December 5, 1951, but dated as of August 28, 1951, and certain supplements subsequently executed, were approved in writing by AEC, as required by their terms (3 R. 561, 573, 575).

Under the subcontract—which provided that Lyles & Lang would construct, furnish, receive

[3] The Savannah River project is one of five major AEC installations for the production of special nuclear material. Now nearly completed, it represents an investment by the United States of approximately 1.5 billion dollars. It occupies approximately 100 square miles of land, and at the peak of construction employed 40,000 construction workers.

rentals from, and operate at four separate sites (Barnwell, Allendale, Williston and Beech Island) a total of 75 dormitory-type buildings, each housing 100 men, for employees of du Pont, its subcontractors, or AEC—Lyles & Lang's sole compensation was du Pont's guarantee of 100 percent occupancy for 24 months at the stipulated rental of $8.25 per person. The subcontract could be terminated in whole or in part for the convenience of the AEC. In the event of termination for such convenience prior to 12 months after the occupancy date of a dormitory building, Lyles & Lang was to be paid its actual costs incurred in connection with such building, plus 20 percent for overhead and profit. Actual costs were defined to exclude personal time and services of principals. Land and salvage values and rental accruals were also to be deducted from the actual cost determination.

Construction commenced shortly after award of the subcontract and, in January, February and March 1952, du Pont accepted the 45 dormitory-type buildings constructed at Barnwell, Williston and Allendale as ready for occupancy. Occupancy experience, however, proved disappointing,[4] and for this reason, on March 5, 1952, du

[4] Counsel for Lyles & Lang and William G. Lyles, one of the principals in the venture, expressed the view that the employment of nonunion labor in the construction of the dormitories, which resulted in picketing and the boycott of the dormitories by du Pont's employees, contributed largely to the low-occupancy rate (2 R. 308, 557).

Pont gave notice of termination of the contract for the convenience of the AEC as to the 30 buildings scheduled for Beech Island before construction had begun (3 R. 585). Termination of the contract with respect to the 30 buildings at Allendale and Williston was effective on October 15, 1952, and as to the 15 buildings at Barnwell, on January 11, 1953.

2. Shortly after the Beech Island termination, discussions between Lyles & Lang and du Pont were instituted to determine the compensation, if any, owing Lyles & Lang under the provisions of Section 3 (b) of the subcontract relating to termination for the convenience of AEC prior to twelve months of occupancy (3 R. 565, 623–625). After notice of termination with respect to Allendale and Williston, du Pont's auditors undertook an examination to ascertain the facts as to Lyles & Lang's costs so that appropriate compensation might be made under Section 3 (b) of the subcontract (2 R. 391–392).

In negotiations relating to compensation under the termination provisions of the subcontract, disputes arose with respect to numerous admittedly factual questions. The factual disputes included the reasonableness of architectural and engineering fees, lawyers' fees, so-called supervisory fees,[5] and other cost items, the value of

[5] The challenged items included fees in excess of $169,000 which had not in fact been paid but which had been recorded

land and buildings, and the proper classification, under accepted accounting practice, of various charges as overhead or direct costs[6] (see e. g., 2 R. 119–120, 402–411; 3 R. 606). A dispute also arose as to whether the 20 percent allowance for overhead and profit was to be computed before or after the deduction from costs—as provided in Section 3 (b) of the subcontract (3 R. 565–566)—of the value of land and buildings retained by Lyles & Lang after termination and the rentals received from operation of the dormitories (2 R. 119; 3 R. 606, 624). Lyles & Lang relied almost entirely on evidence outside the subcontract to support its position as to the intent of the parties.[7]

Although the subcontract contained a standard Government form disputes clause (Sec. 11, *supra*,

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in the company's books as payable to principals of the venture after termination notices had been received from du Pont (2 R. 399–402, 413; 3 R. 623).

[6] Under Section 3 (b) of the subcontract, overhead costs are not directly reimbursed but are paid for by an allowance of 20 per cent of direct costs "for overhead and profit" (3 R. 565). By taking credit for overhead costs as direct costs, as the Government contends was done here, double compensation for overhead is allowed, plus an additional 20 percent on the overhead allowed as direct costs. The disputed overhead items exceed $298,000. The amount involved in the controversy as to overhead, therefore, after adding the additional 20 percent allowance, exceeds $358,000.

[7] Over $323,000 was involved in this dispute. It should be noted that there is some overlapping in the amounts involved in the various disputes. Accordingly, these sums are not cumulative.

pp. 4–5; 3 R. 568), Lyles & Lang did not invoke the disputes clause and instituted this action without resort to, or exhaustion of, the administrative machinery prescribed in the contract.

3. The subcontract also contained as an AEC requirement the customary provision of Government procurement (including construction) contracts prohibiting the unconsented assignment of the contract or any interest therein (Sec. 13, *supra*, p. 5; 2 R. 355–357, 363). While the subcontract was still under negotiation, Lyles & Lang had proposed to assign the contract to a partnership to be composed of a group of individuals, some but not all of whom were stockholders of Lyles & Lang, but du Pont had refused to approve such an assignment (2 R. 201–202). Notwithstanding the anti-assignment clause and du Pont's refusal to consent to an assignment, Lyles & Lang, without disclosing the fact to du Pont or AEC, entered into an "Agreement of Joint Venture" (3 R. 625–639) with the individuals who were to have been members of the proposed partnership. This joint venture agreement came to light for the first time during the examination of Lyles & Lang's books by du Pont and AEC auditors after termination of most of the subcontract in September or October 1952 (2 R. 185–186).

Although some of the joint venturers were stockholders of Lyles & Lang, a 24 percent interest in the joint venture was owned by persons

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who were not stockholders.[8] The joint venture agreement recites that a partnership had been proposed but abandoned because it appeared that the subcontract, according to some authorities, "will be deemed a contract with the United States Government and unassignable under the Public

[8] The relative interests in Lyles & Lang and the joint venture were as follows:

Individual	Lyles & Lang at 8/28/51	Joint venture
		Percent
John T. Lyles	1/8	4. 4818
Dan D. Lang	1/8	4. 4818
W. G. Lyles	1/8	8. 9636
T. J. Bissett	1/8	8. 9636
W. A. Carlisle	1/8	8. 9636
Louis M. Wolff	1/8	8. 9636
Wm. Stork	1/8	----------
J. M. Fulmer	1/16	8. 9636
R. Barnes	1/16	8. 9636
Calhoun Lemon	----------	4. 7619
C. G. Fuller	----------	19. 0476
Lyles & Lang Const. Co	----------	13. 4453

It should be pointed out that the architectural, engineering and supervisory fees, previously described as in dispute (*supra*, pp. 8–9), were recorded as owing to firms in which W. G. Lyles, T. J. Bissett, W. A. Carlisle and Louis M. Wolff, who owned 50 per cent of the stock of Lyles & Lang and a 36 per cent interest in the joint venture, were partners. Similarly, attorneys' fees were recorded as owing to Fulmer and Barnes whose partners owned 12½ per cent of the stock in Lyles & Lang and an 18 per cent interest in the joint venture. W. G. Lyles and R. Barnes were the principal actors in all negotiations with respect to execution, performance and termination of the contract (2 R. 155, 349–350). Their firms' fees of $169,000, plus 20 per cent for overhead and profit, were claimed and allowed despite the subcontract's exclusion from costs of any costs for the personal time or services rendered by principals (2 R. 366–370; 3 R. 565).

Contracts Act (Title 41, Sec. 15 USCA)." The agreement then provides that "the activities of the undersigned parties in carrying out the du Pont contract shall be a joint venture for the benefit of [Lyles & Lang] and the individuals named" in percentages stated in the agreement (Sec. 1); and that "its purpose shall be solely to carry out the terms of and fulfilling that contract" (Secs. 3, 4). Title to "all property of the venture" was to be "in the name of [Lyles & Lang], for and on behalf of the joint venture" (Sec. 16); and "All moneys or other property received by [Lyles & Lang] on account of the joint venture should be "immediately credited to the joint venture" (Sec. 12).

Section 7 of the joint venture agreement provides that "All matters of general policy and conduct of the business for which the joint venture is formed shall be decided by the members of the joint venture" in accordance with the percentage of their interest. It further provides that in case of dispute "the decision of a majority of interest" should be "final and conclusive upon all parties" and that the venture would "indemnify [Lyles & Lang] for any loss or penalty which it incurs by reason of its acting in accordance with a decision of a majority in interest of the adventurers, when the dissent of [Lyles & Lang] is filed in writing." Additionally, the parties were to devote their best interests to the conduct of the venture and "not do any act which

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may be inimical thereto" (Sec. 13), and they agreed to designate persons to "manage and conduct the administrative details of the undertaking" (Sec. 17).

In accordance with the provisions of the joint venture agreement, the income tax returns of Lyles & Lang and of the joint venture filed during the period of operation of the subcontract reported that the property used in performing the subcontract, the costs incurred, and the gross income derived were the property, costs and income of the joint venture and not of Lyles & Lang and that Lyles & Lang's income from the subcontract was limited to a 6 percent construction fee payable to it by the joint venture (3 R. 640–666).

4. Although under the terms of the joint venture agreement, "Title to all property of the venture" was to "be in the name of [Lyles & Lang], for and on behalf of the joint venture" and "all contracts" were also to "be in the name of [Lyles & Lang] for and on behalf of the joint venture" (3 R. 634), Lyles & Lang, rather than the joint venturers, brought this action, without invoking the contract machinery for the settlement of the numerous factual disputes, to recover (1) the compensation provided by Section 3 (b) of the subcontract in the event of termination for the convenience of AEC, and (2) damages for breach of the subcontract because of termination before the dormitories at Beech Island had been constructed (1 R. 37–58).

During the operation of the dormitories, Lyles & Lang had received as rent and other income a total of $1,440,843.82 (1 R. 36), of which $1,282,291.15 was paid by du Pont under its guarantee agreement (Pl. Ex. 47, Ex. C, not printed). Following the respective terminations, it had received $131,081.39 from salvage of buildings and materials, and it had retained land found to have a value of $43,095.40. Prior to the commencement of this action, du Pont had paid Lyles & Lang $613,412.11 on account of the respective terminations (1 R. 28). Thus, when suit was filed Lyles & Lang had received a total of $2,228,432.72 as compared with direct costs (exclusive of challenged items) of $2,127,509.10.

Pursuant to the terms of the prime contract (see fn. 1, *supra*, p. 1), the Government assumed the defense of the action (1 R. 83). On behalf of du Pont, it filed an answer which defended on the grounds, among others, that the suit was barred because of Lyles & Lang's failure to exhaust the disputes procedure provided for in the subcontract, and that the assignment of the subcontract to the joint venture rendered it void and precluded recovery on the subcontract. Motions before trial (1) for judgment on the pleadings because of failure to invoke the disputes machinery, and (2) to limit the issues to those not in-

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volved in the factual disputes were denied (1 R. 79, 102).[9]

The District Court ruled that the disputes clause was inapplicable to the disputes in the instant case and that the joint venture agreement was not an assignment (1 R. 5, 106). It heard voluminous evidence and ruled upon the various factual issues in dispute, finding for Lyles & Lang on both counts and directing entry of judgment in the amount of $854,614.50 (1 R. 37). This amount included some $70,000 as interest to the date of judgment (1 R. 34, 35).

The Court of Appeals affirmed the judgment in all respects, except as to the award of damages for breach of contract relating to the Beech Island termination and the allowance of interest "at the legal rate fixed by statute." (App., *infra*, pp. 25a–28a, 31a.) As to the latter, it directed the district court to award interest "at the rate plaintiff would have had to pay upon a loan of a similar amount." (App., *infra*, p. 31a.) Reversal as to the breach of contract count reduced the judgment to $744,569.92. In particular, the Court of Appeals held that the disputes clause was inapplicable,

[9] Du Pont having made an assignment of the subcontract to the United States as provided by Section 13 of the subcontract (3 R. 569), the United States also moved, prior to trial, for leave to intervene and to be substituted as a defendant, and du Pont moved to dismiss the action as to it (1 R. 104, 113; 2 R. 154). All of these motions were denied (1 R. 114).

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that the joint venture did not violate the anti-assignment clause, and that, in any event, du Pont had waived the right to rely on these provisions (App., *infra,* pp. 8a–15a).

REASONS FOR GRANTING THE WRIT

In holding that respondent Lyles & Lang is entitled to maintain this action although it failed to exhaust its administrative remedy under the standard Government form disputes clause,[10] the decision below directly conflicts with this Court's decisions in *United States* v. *Holpuch Co.,* 328 U. S. 234, 239–240; *United States* v. *Blair,* 321 U. S. 730, 735; and *United States* v. *Callahan Walker Co.,* 317 U. S. 56, 61. And in ruling that the joint venture agreement did not violate the standard form anti-assignment clause, the decision conflicts in principle with *United States* v. *Shannon,* 342 U. S. 288. as well as with the policy of the federal anti-assignment legislation. Further, insofar as the court held that a prime contractor may effectively waive a subcontractor's compliance with standard form provisions incorporated in the subcontract to protect governmental interests, it decided an important question of federal law which has not been, but should be, settled by this Court. In view of the continuing importance to the Government of these standard form clauses, not only in the day-to-day performance of Government

[10] This clause is also known as the "finality clause." See *United States* v. *Wunderlich,* 342 U. S. 98.

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contract activity but also in the significant field of the Atomic Energy Commission's and other agencies' contract management operations,[11] further consideration of this case is plainly appropriate.

1. In *Holpuch, supra,* the Court reiterated its prior rulings in *Blair* and *Callahan Walker, supra,* that "when a contractor chooses without due cause to ignore the provisions of [the disputes clause] he destroys his right to sue for damages * * *." 328 U. S. at 240. The court below dismissed these cases as "not in point" (App., *infra,* p. 11a), but none of the reasons offered justifies departure from the well-settled principle announced in those cases.

The Fourth Circuit first suggested that the disputes clause is inapplicable because the issues here did not arise during "performance" of the contract but relate only "to the amount due under the contract upon its termination." The clause itself, however, expresses no such limitation. It applies to "*all* disputes concerning questions of fact arising *under* this Agreement" (3 R. 568, *supra,* p. 4 emphasis added). And the stated purpose of the clause, to provide "administrative machinery * * * to adjudicate disputes" (*United States* v. *Blair,* 321 U. S. at 735), is as applicable in the one case as the other. "It is a clear, unambiguous provision applicable at *all* times * * *."

[11] See *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232.

United States v. *Holpuch Co.*, 328 U. S. at 239. [Emphasis added.] As the Court pointed out in *Holpuch*, "nearly every dispute between a contractor and the Government ultimately involves the amount of payment under the contract." *Id.* at 241, n. 5. And termination clauses, contemplating the calculation of costs and losses on cancellation, have become a common, almost universal, part of the larger Government supply and construction contracts and subcontracts; disputes frequently arise out of such calculations and they form a substantial portion of all factual disputes. To hold that the disputes clause does not cover such controversies would be drastically to limit its effectiveness.[12]

The court below also found the disputes clause inapplicable because issues of law as well as issues of fact are involved in this litigation.[13] It is clear, however, that compliance with the con-

[12] The court below placed reliance on *United States* v. *Duggan*, 210 F. 2d 926 (C. A. 8). But that case involved a claim *by* the Government, not *against* the Government. Cf. *Wildermuth* v. *United States*, 195 F. 2d 18 (C. A. 7), which holds the disputes clause applicable to a termination claim against the Government.

[13] These issues of "law" relate to the interpretation of the contract. In our view, questions of contract interpretation which turn upon extrinsic evidence may properly be considered questions of "fact" for the purpose of the disputes clause. Cf. *United States* v. *Moorman*, 338 U. S. 457, 462. Although we do not raise this problem as a ground for further review, we reserve the right to present it, as fairly comprised within the principal question, in the event that certiorari is granted.

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tract requirement for exhaustion of the administrative remedy is not excused merely because other issues are raised which are reserved for judicial disposition. *United States* v. *Blair,* 321 U. S. 730; cf. *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535. Nor is the disputes clause procedure rendered inapplicable here because some of the questions are mixed questions of law and fact. Such questions of allowable costs under the contract—*e. g.,* respondent's actual costs in building and operating the dormitories; the reasonableness of respondent's expenditures; allocation of respondent's charges between "overhead" and "costs;" the "proper value" of the land, buildings, and equipment after termination (1 R. 69–70)—are typical of disputes coming within the purview of a disputes-of-fact clause. See *e. g., United States* v. *Wunderlich,* 342 U. S. 98 (proper basis for charge for use of heavy equipment); *United States* v. *Callahan Walker Co.,* 317 U. S. 56 ("equitable adjustment" involving "ascertainment of the cost" of work plus "reasonable and customary allowance for profit"). And, in contrast with the statement of the court below that the disputes clause "should manifestly be given a strict construction" (App. *infra,* p. 10a), this Court has pointed out that the clause is "clear" and "unambiguous" and "[n]o court is justified in disregarding its letter or spirit." *United States* v. *Holpuch Co.,* 328 U. S. at 239.

In addition, the Court of Appeals refused to give effect to the disputes clause on the ground that petitioner had waived the right to rely upon it by not invoking it prior to this litigation. But it is clear from the face and theory of the clause that, with respect to disputes which are not resolved to the satisfaction of respondent, respondent alone is obliged to invoke the administrative machinery prescribed therein. See *United States* v. *Blair, supra*.[14] Waiver was also based on the fact that petitioner's answer herein—along with averring respondent's failure to exhaust the disputes procedure—denied liability and asserted a counterclaim. But, plainly, the fact that petitioner *denies* liability shows in itself that there is a dispute calling for the utilization of the disputes clause, and insofar as factual disputes were at the bottom of the counterclaim it was asserted

[14] The court also stated that petitioner did not invoke the administrative machinery after institution of this litigation. Since petitioner's answer expressly raises the defense that respondent's claims are barred for failure to exhaust the administrative remedy (1 R. 62-63), presumably the court means only that petitioner did not ask the court to order respondent to pursue its administrative remedy. But the analogy drawn by the court to an arbitration agreement and the power of the courts under the United States Arbitration Act to stay an action pending referral to arbitration is mistaken. As we have seen, if a contractor fails to exhaust his administrative remedy under the disputes clause, "he destroys his right to sue for damages." *United States* v. *Holpuch Co.*, 328 U. S. at 240.

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because the court might, as it did, hold the disputes procedure inapplicable.[15]

Finally, the need for review here is underscored by the court's erroneous reference to the Act of May 11, 1954, 68 Stat. 81,[16] as modifying the rule approved in *Holpuch* (App., *infra*, p. 11a). That Act merely enlarged the scope of

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[15] The court below also found a waiver in the statement quoted from an inter-office memorandum of petitioner to the effect that respondent was told "that if Lyles & Lang did not feel they could settle within the bounds set forth, that they would have to resort to legal action." (App., *infra*, p. 11a; 3 R. 595). This statement does not purport to be a quotation of a statement actually made to respondent, nor to reflect the context in which any such statement was made. In the context quoted from the memorandum, it would appear to relate principally to "the point of application of the 20 percent overhead and profit item and the difference in the treatment of net rental accruals" (3 R. 595), both of which questions involved interpretation of the contract. Moreover, the reference by nonlawyers to "legal action" does not necessarily exclude the contract requirement of formal submission of disputes for administrative decision to the AEC's local representative and an appeal to the AEC itself. In fact, it appears the disputes clause was not even discussed (2 R. 208–209, 504).

[16] "* * * no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. * * *"

judicial review under the disputes clause, and far from supporting the decision below, it manifests Congressional approval of the administrative machinery created by the disputes clause. Necessarily, the administrative machinery must be invoked before the courts can determine, under the Act, whether the executive determination is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence" (68 Stat. 81).

2. In *United States* v. *Shannon,* 342 U. S. 288, this Court ruled that the long-standing considerations of public policy underlying the Anti-Assignment Act—in that case, R. S. 3477, 31 U. S. C. 203—outweighed the special circumstances which the Fourth Circuit had thought to be controlling (186 F. 2d 430). Specifically, this Court held that the broad sweep of the Anti-Assignment Act could not be held inapplicable because the assignment of the claim had been executed under a mutual mistake of law and that the prohibitions of the Act could not be by-passed by the use of a "procedural contrivance." *Id.* at 293–294. Despite this admonition, the court below has once again permitted an assignor to escape the reach of these prohibitions by the "procedural contrivance" of a joint venture which defeats the prime purpose of the prohibition against transfer of a contract.

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On its face, the particular anti-assignment clause involved here (*supra*, p. 5)—which embodies the statutory provisions of 41 U. S. C. 15—is all-embracive. Broader than R. S. 3477, it expressly prohibits transfers "by operation of law" and the voluntary assignment "for any purpose whatsoever" of "any interest" in the subcontract "directly or indirectly" without petitioner's consent. In all but name, we submit, the joint venture here constituted an assignment "directly or indirectly" of an interest in the subcontract.[17]

The court below stated that the joint venture agreement amounted to no more than a method of financing performance of the subcontract and of sharing in its profits. But the joint venture agreement is clearly to the contrary. It (3 R. 625–637) provides that "its purpose shall be solely to carry out the terms of and fulfilling that contract" (Sec. 4); that "Title to all property of the venture shall be in the name of [respondent], for and on behalf of the joint venture" (Sec. 16); that "All moneys or other property received by the [respondent] on account of the joint venture shall * * * be immediately credited to the joint venture" (Sec. 12); that *"All matters of*

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[17] Section 5 of the joint venture agreement recites that it "shall not be interpreted as a transfer or assignment of the du Pont contract, or of any interest therein" (3 R. 633). This self-serving declaration, however, cannot clothe the venture with the cloak of legality if in fact and in law there was an assignment of an interest in the subcontract. Cf. *United States* v. *City and County of San Francisco*, 310 U. S. 16, 28.

general policy and conduct of the business for which the joint venture is formed shall be decided by the members of the joint venture in accordance with the percentage of their interest" (Sec. 7); that in case of dispute, *"the decision of a majority of interest in profits and losses shall control and be final and conclusive upon all parties"* (Sec. 7); that respondent is "primarily" responsible for carrying out the contract (Sec. 7); and that "the venture will indemnify the [respondent] for any loss or penalty which it incurs by reason of its acting in accordance with the decision of a majority in interest of the adventurers, when the dissent of the [respondent] is filed in writing" (Sec. 7). [Emphasis added.]

That the joint venture agreement was more than a mere profit sharing arangement is also shown by the evidence adduced in the District Court. Thus, the joint venture filed a tax return claiming the entire interest in all property and income related to or derived from the subcontract (3 R. 643–648). And respondent's tax returns and financial statements recognized and accepted this claim (3 R. 609–649, 656; 2 R. 545–552). *Supra,* p. 13. These tax returns, which were filed by respondent and the joint venture during the period of operation of the subcontract, are cast on the theory that the property used in performing the subcontract, the costs incurred, and the gross income derived were the property,

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costs, and income of the joint venture rather than of the respondent—and that respondent's income from the subcontract was limited to a 6 per cent construction fee payable to it by the joint venture (3 R. 640–666). The returns establish beyond doubt a violation of the subcontract's prohibition against allowing any person "directly or indirectly" to have "any interest in" the subcontract "for any purpose whatever."[18]

In holding that there was no assignment, the court below quoted with approval the District Court's statement that "the Joint Venture Agreement does not purport to substitute for the [respondent's] obligations to the [petitioner] the obligations of any other party." (App., *infra*,

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[18] Other evidence of record, too detailed for discussion in this petition, fully supports this conclusion. Should certiorari be granted, we are prepared to show that, except for conclusory statements of respondent's witnesses which may be dismissed as self-serving, every inference from the undisputed facts and every scrap of documentary evidence bears out the view that the parties acted on and carried out their agreement, and that the joint venture "took over" as the agreement provided it should. At this time, it need only be noted that William G. Lyles, a member of the joint venture, testified on cross-examination, that "it was my understanding that the joint venture took over." (2 R. 330.) Similarly, Mr. Lang, respondent's president and a member of the joint venture, acknowledged on cross-examination that respondent's interest in the subcontract was confined to the 6 per cent construction fee reserved to it by the joint venture agreement and that respondent "doesn't have an interest, except as a member of the joint venture in the profits." (2 R. 531–532.)

p. 15a). The comfort which the court drew from this fact merely highlights the error. That respondent remained obligated under the subcontract is irrelevant, for even in an approved assignment there could be no substitution of obligations. The anti-assignment clause specifically provides that "In the event that approval is granted by [petitioner] for any assignment of rights, the [respondent] shall be responsible to [petitioner] for the assigned portion to the same extent and to the same manner as for the portion operated by him direct" (3 R. 569, *supra*, p. 5). Moreover, the fundamental aim of anti-assignment provisions is to assure that the performance of the work will actually be done by and under the control of the party with whom the Government (or its prime contractor) has dealt, and not some stranger. Cf. *United States* v. *Shannon*, 342 U. S. 288, 291; *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 373. That significant purpose was frustrated here, as we have shown (*supra*, pp. 23–24), by the specific terms of the joint venture which gave it, rather than respondent, dominant sway over the performance of the contractual work.[19]

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[19] The court below also suggested that petitioner had waived the prohibition of the anti-assignment clause because it learned of the joint venture agreement some time before the termination of the contract, "and notwithstanding such knowledge continued to do business with [respondent], having it continue the business of renting the buildings, requir-

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Because of the illegal joint venture agreement, respondent's contract with petitioner should have been deemed annulled and respondent left to its recovery in *quantum meruit*, not to exceed the contract price. This is the normal result of a breach of the anti-assignment statute, 41 U. S. C. 15. *Wheeler* v. *United States*, 5 C. Cls. 504; *Heathfield* v. *United States*, 8 C. Cls. 213; *Francis* v. *United States*, 11 C. Cls. 638. Alternatively, rescission could have been allowed for breach of this important condition included for the protection of the Government. Cf. *Callanan* v. *Powers*, 199 N. Y. 268; *Pan-American Petroleum and Transport Co.* v. *United States*, 273 U. S. 456. But the suit should not have been allowed to proceed as if there were no breach.

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ing it to remove them when the contract was terminated, giving it notice of the termination and paying large sums to it." (App., *infra*, p. 13a.) But as we noted above, even if the assignment had been approved, respondent would still have been obligated under the subcontract for the performance thereof. Moreover, immediately upon discovery of the joint venture agreement, petitioner reconsidered its proposals for termination payments to respondent because it regarded the services performed by members of the joint venture as the services of principals and therefore not reimbursable under the contract prohibition against compensation for the personal service of principals (2 R. 497; 3 R. 620). And insofar as petitioner purportedly required demolition and removal of the buildings after discovery of the joint venture agreement, it should be noted that the contract provision for demolition was inserted for respondent's benefit to enable respondent to depreciate costs on a two-year basis for tax purposes (2 R. 162; 3 R. 608) and that the joint venture's tax return was in fact filed on this basis (3 R. 645-646).

3. In addition to the disputes clause and the anti-assignment clause, respondent's subcontract contained the following standard form provisions similarly designed to effectuate statutory and executive policy (3 R. 561–571): a covenant against contingent fees (Sec. 9—see 41 U. S. C. 254); a clause excluding members of Congress and others from any benefit under the contract (Sec. 10—see 41 U. S. C. 22); a prohibition against the employment of convict labor (Sec. 12—see 18 U. S. C. 436); an anti-racial discrimination provision (Sec. 17—see Executive Order 9346, 8 F. R. 7183); and a clause incorporating all the provisions required by Sec. 104 of the Renegotiation Act of 1951, 50 U. S. C. App. 1211 *et seq.* (Sec. 20). If, as the court below held, a prime contractor may effectively waive a subcontractor's compliance with the disputes clause and the anti-assignment clause, without the consent of the Government, the necessary implication of that holding is that these other standard form provisions may also be waived.

The suggestion that public policy can thus be vitiated—unintentionally, as in this case (if at all), or through collusion—*a priori* invites rejection. These provisions were inserted in respondent's contract with petitioner at the insistence, and to protect the interests, of the Government. To insure their incorporation, the written consent of AEC was required and obtained before the subcontract was binding

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(3 R. 571). This Court has recently indicated that, at least for some purposes, governmental functions performed by the use of independent contractors are entitled to the same immunities and same treatment as those performed by Government employees. Cf. *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110. And it is well-settled that the Government is neither bound nor estopped by the unauthorized acts of its officers and employees. *E. g., United States* v. *California*, 332 U. S. 19, 39–40; *Federal Crop Ins. Corp* v. *Merrill*, 332 U. S. 380, 384; *United States* v. *City and County of San Francisco*, 310 U. S. 16, 32. No federal employee could waive the comparable clauses in a prime contract with the Government. If a distinction is to be drawn in this area between employees and independent contractors who perform governmental functions under conditions required to be approved by the Government, that distinction should be authoritatively drawn by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1955.

APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 6852

E. I. DU PONT DE NEMOURS & COMPANY, AND UNITED STATES OF AMERICA, APPELLANTS

v.

LYLES & LANG CONSTRUCTION COMPANY, APPELLEE

Appeal From the United States District Court for the Eastern District of South Carolina, at Columbia.

(Argued October 18, 1954. Decided February 2, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

James L. Morrisson, Attorney, U. S. Atomic Energy Commission, (Warren E. Burger, Assistant Attorney General, N. Welch Morrisette, United States Attorney, Paul A. Sweeney and Morton Liftin, Attorneys, Department of Justice, and William Mitchell, General Counsel, U. S. Atomic Energy Commission, on brief) for Appellants, and James F. Dreher (David W. Robinson, and Robinson, Robinson & Dreher on brief) for Appellee.

PARKER, Chief Judge:

This is an appeal from a judgment for plaintiff in an action to recover agreed compensation un-

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der the terms of a contract and damages for an alleged breach. The contract was one entered into by the plaintiff, Lyles & Lang Construction Company, as a subcontractor, with the defendant, E. I. du Pont de Nemours & Company, the holder of a contract with the United States Atomic Energy Commission for the construction of the Savannah River project. Under the contract sued on plaintiff agreed with defendant to construct 75 dormitory buildings to house 7,500 workers on the project, and defendant agreed that it would guarantee 100% occupancy of the buildings so constructed at an agreed rental rate for a period of two years after completion and acceptance, with provision that defendant might terminate the contract upon payment of certain stipulated amounts if after the first year of occupancy or upon a cost plus basis if prior to the end of the first year. The contract was terminated before the end of the first year of occupancy and before the commencement of construction at one of the sites where 30 of the dormitory buildings were to be constructed. The action was to recover compensation on the cost plus basis provided by the contract with damages for breach as to the 30 buildings which had not been constructed.

The defendant filed answer and counterclaim in which it joined issue with plaintiff on the allegations of the complaint, denied all liability under the contract on the ground that plaintiff had entered into a joint venture agreement in violation of its provisions, pleaded the disputes clause of the contract in bar of the right to maintain the action and, by way of counterclaim, asked recovery of the full amount of $1,900,832.17 theretofore

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paid plaintiff or, in the alternative, the amount by which plaintiff had been overpaid on account of the termination of the contract, this amount to be determined by audit. Plaintiff filed reply to the answer and counterclaim denying that the joint venture was a violation of the contract or that defendant was entitled to recover anything under its counterclaim, at the same time filing a motion to strike the defense based on the disputes clause. Subsequently defendant moved for judgment on the pleadings and a month or so later moved to eliminate from the trial of the case all issues of fact. Defendant moved subsequently that the United States be substituted for defendant as a party in the case and, when this was denied, that the United States be brought in as an additional party.

The trial judge denied the motion to make the United States a party and held that neither the joint venture agreement nor the disputes clause in the contract barred the plaintiff of the right to maintain the action. The case was then heard before the judge without a jury, a full hearing was had on all the issues involved and the judge held that plaintiff was entitled to recover under the contract the costs incurred in the construction of the buildings accepted for occupancy, together with the 20% provided by the contract for profit and overhead, less the value of the land, the salvage of the buildings and rental accruals prior to termination. In costs and not overhead he included items such as architects' and engineering fees, legal costs and interest charges applying to the project as a whole and not individual buildings, and refused

to exclude items representing services rendered by corporations controlled by persons interested in the joint venture. He held, also, that there was no right to terminate the contract with re-respect to the buildings which had not been constructed and accepted and that the attempted termination with respect to these constituted a breach of contract for which plaintiff was entitled to recover the profit that would have been realized if they had been constructed and accepted. He allowed interest at the legal rate of 7% on all items, beginning as to each item thirty days after notice of termination of the contract with respect to the site to which it related.* He found the facts in a comprehensive opinion which dealt fully with all matters in dispute. Those relating to the questions raised on this appeal will be stated at greater length in the sections of the opinion dealing with those questions.

Eight questions are raised by the appeal, viz: (1) Was there error in refusing to make the United States a party to the action? (2) Was there error in holding that plaintiff was not barred by the disputes clause of the contract from maintaining the action? (3) Was there error

*Although the contract provided generally for the construction of 75 buildings without providing where any of them were to be built, the parties later agreed that 15 buildings each should be built on sites at Allendale, Williston and Barnwell and 30 at Beech Island. The buildings at Beech Island were never constructed. The others were constructed and accepted for occupancy, but the contract as to them was terminated prior to twelve months following the date of occupancy. The notices of termination were given upon different dates as to each of the sites.

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in holding that plaintiff was not barred from maintaining the action by reason of the joint venture agreement? (4) Was there error in including as costs the charges for services rendered by corporations controlled by persons who were parties to the joint venture agreement or services rendered by such persons themselves? (5) Was there error in applying the 20% allowed by the contract for overhead and profit to the gross costs of construction before the deduction for land, salvage and rent accruals? (6) Was there error in including in cost such items as engineering and architectural and legal fees, which applied to the project as a whole and not to individual buildings? (7) Was there error in holding that there was no right of termination with respect to buildings not constructed and accepted for occupancy and awarding damages for breach of contract with respect to such buildings? And (8) Was there error in awarding interest at the legal rate prior to judgment? With respect to the first six questions, we think that the action of the lower court was correct and should be sustained. We think there was error in holding that there was no right to terminate the contract as to the buildings not constructed and in awarding damages for breach of contract with respect thereto. As to the award of interest, we think that interest should be allowed prior to judgment but not necessarily at the legal rate. We shall discuss the questions stated in the order heretofore set forth.

1. The question of joinder

The contract between defendant and the United States acting through the Atomic Energy Commission provided that the government would indemnify and hold the defendant harmless against all expense, loss or damage arising out of or connected with the work to be done thereunder, and would assume and carry on the defense of all "claims, suits or legal proceedings" asserted or instituted against the defendant on account of acts or omissions in the performance of the work, and would pay and discharge all final judgments obtained against the defendant in such litigation. Under this provision, attorneys of the Department of Justice handled this litigation for the defendant from its inception. A provision of the contract between plaintiff and defendant provided that that contract might be assigned by defendant to the United States; and on July 3, 1953, after all pleadings had been filed and the cause had been at issue for several months and a number of hearings had been held, counsel for the government representing the defendant caused an assignment of the contract to be made to the United States and moved under Rule 25 (c) of the Federal Rules of Civil Procedure that the United States be substituted for the du Pont Company as party defendant. This motion was denied, as was a motion then made that the United States be allowed to intervene. At the opening of the trial a motion was made to dismiss the action on the ground that du Pont no longer had any liability under the contract.

We think that all of these motions were properly denied. The contract of plaintiff was with defendant, not with the United States, and defendant in making it was acting as an independent contractor, not as an agent of the government. Cf. *Carson* v. *Roane-Anderson Company,* 342 U. S. 232, 236; *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *United States,* Ct. Claims, 81 F. Supp. 596. Before the assignment had been made the contract had been terminated by the defendant, plaintiff's right to recover under its provisions had become fixed, suit had been instituted for recovery, hearings had been held and the case was ready for trial. Substitution of the United States as a defendant might well have ousted the court of jurisdiction, since the amount sued for was greater than allowed by the Tucker Act; and, although defendant denies that there was any intent to affect jurisdiction, it is well settled that the parties could not by consent confer jurisdiction on the court. Under such circumstances, the court was acting well within the limits of the sound discretion contemplated by Rule 25 (c) in refusing to allow the substitution asked.

We think, also, that the court was acting well within the limits of the sound discretion reposed by Rule 24 (b) in refusing to allow intervention by the United States. Assuming that such intervention would not have affected the court's jurisdiction, there was manifestly no need for it. There is no reason to think that the attorneys of the Department of Justice representing the defendant would have acted differently or that the

results in the case would have been in any respect different, if the United States had been made a party of record. There was, of course, no right to intervene as of right under Rule 24 (a). Not only was the application not timely but there was no reason to think that the representation of the interest of the United States by defendant, represented by attorneys of the Department of Justice, was or might be inadequate.

2. The disputes clause

The disputes clause of the contract upon which defendant relies is section 11, which is as follows:

> SECTION 11. Disputes. Except as otherwise specifically provided in this Agreement, all disputes concerning questions of fact arising under this Agreement shall be decided by the Manager of the Commission's Savannah River Operations Office subject to written appeal by the Operator within thirty (30) days to the Commission, whose decision or that of its duly authorized representative shall be final and conclusive upon the parties hereto. In the meantime the Operator shall diligently proceed with the work as directed. Appeals to the Commission under this Section shall be submitted through du Pont.

Defendant has never asked that any dispute of fact be referred under this section of the contract, but has merely pleaded same in bar of plaintiff's right to recover in an answer in which all liability under the contract is denied and a counterclaim for recovery of moneys paid plaintiff is asserted, and has later asked in a motion that the issues be so limited as to exclude all issues of fact from the trial of the case on the basis of the disputes

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clause, without suggesting that such issues be referred under that clause or that proceedings be stayed pending the reference. We think it clear that the trial judge correctly refused to hold the action barred for failure to proceed under the clause or to limit the issues in the case by excluding all issues of fact.

In the first place, we do not think that the disputes clause has any application to a case such as this. The contract was not one under which plaintiff was constructing buildings for defendant, as in an ordinary construction contract, but one under which it was constructing buildings for itself to be owned and rented by itself. The defendant was interested that they be constructed so that the personnel working on the Savannah River project could be housed and it accordingly guaranteed a rental to plaintiff for a two year period as an inducement to construction, with an agreement that the period might be extended to three years at defendant's request but with a further provision that at the end of the period they be torn down and removed so as not to result in the creation of slum conditions. The defendant reserved the right to terminate the contract at any time as to any building or buildings, agreeing upon certain lump sum payments if terminated during the second year of occupancy and to reimburse plaintiff for costs plus 20% for overhead and profits, with certain deductions, if terminated prior to the expiration of the first year of occupacy. The disputes clause was evidently intended to furnish a ready means of administrative settlement of questions arising during the performance of the contract which might delay

or interfere with performance, not to provide for unilateral determination of the amount due under the contract upon its termination. *United States* v. *Duggan,* 8 Cir. 210 F. 2d 926.

Furthermore, the questions involved in the litigation, as pointed out by the trial judge, were almost altogether questions of law and not disputes concerning questions of fact. They were questions as to whether under a proper interpretation there was a right to terminate the contract as to any building to be constructed under the contract prior to acceptance for occupancy, whether costs incurred on account of persons connected with the joint venture agreement were properly includible in costs, whether the 20% allowed for overhead and profits should be computed on gross costs or on the net after certain deductions, whether certain items were includible in overhead under a proper interpretation of the contract, etc. Even where disputes as to fact existed, they involved not pure questions of fact but mixed questions of law and fact, such as whether costs incurred for legal and engineering and architect's fees were to be determined on the basis of contracts made with respect thereto or on the basis of reasonable value, and, if so, what value was reasonable under the circumstances of the case. This clause of the contract, which had been drafted by defendant and which placed the settlement of fact disputes in the hands of the agency of the government which would be responsible for any losses thereunder, should manifestly be given a strict construction; and certainly it should not be interpreted to cover questions of the sort here involved. Cases upon which defend-

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ant relies such as *United States* v. *Holpuch Co.*, 328 U. S. 234 and *United States* v. *Wunderlich*, 342 U. S. 98, are not in point, since the disputes there were disputes of fact arising in the performance of the contract; and it is worth noting that Congress by the Act of May 11, 1954, 68 Stat. 81, has modified the rule there approved, in so far as it applies to government contracts.

Even if it be considered that there are some disputes of fact in the case covered by the disputes clause, we think it clear that defendant has waived the right to rely on it. Not only has it not been invoked for the settlement of any disputes either before or after the institution of the litigation, but it appears also that in the course of negotiations as to the amounts due on account of termination the representative of defendant told the representative of plaintiff "that if Lyles & Lang did not feel they could settle within the bounds set forth, that they would have to resort to legal action"; and, after plaintiff had resorted to legal action, defendant filed answer under which it not only denied all liability under the contract but asserted a counterclaim which would have required the court to adjudicate on its behalf the very matters which it denies that the court has jurisdiction to adjudicate on behalf of plaintiff. It is absurd for defendant to contend that plaintiff should be required to seek settlement under the disputes clause of a contract in the face of a denial by defendant that plaintiff has any rights whatever under the contract. It is equally absurd that defendant should ask the court to pass upon matters under its counterclaim and at the same time deny to the court the

power to pass upon the same matters in connection with the claim of plaintiff.

The disputes clause is, of course, a limited agreement to arbitrate; and it is quite generally held that the right to rely upon an arbitration agreement contained in a contract is waived by denial of liability under the contract. *The Atlanten*, 252 U. S. 313; *Jones* v. *Fox Film Corp.*, 6 Cir. 68 F. 2d 116, 117; *Home Ins. Co.* v. *Scott*, 6 Cir. 46 F. 2d 10, 13, reversed on other grounds 284 U. S. 177; *Mitsubishi Shoji Kaisha, Ltd.* v. *Nicolau*, 38 F. Supp. 156, 157; *Wallace* v. *German-American Ins. Co.*, 41 F. 742; 3 Am. Jur. p. 887–888; 29 Am. Jur. p. 931; notes 15 L. R. A. (N. S.) 1055, 1073–1075; 117 A. L. R. 314; 3 A. L. R. 2d 383, 400–417. It is also quite generally held that right to rely upon an arbitration agreement is waived by filing a counterclaim, which, without demanding arbitration, asks relief from the court with respect to matters embraced within the agreement. *Radiator Specialty Co.* v. *Cannon Mills, Inc.*, 4 Cir. 97 F. 2d 318, 117 A. L. R. 299; *The Belize*, 25 F. Supp. 663; notes 117 A. L. R. 301, 308–312.

No stay of Proceedings under the United States Arbitration Act, 9 U. S. C. 3, was asked and we consequently need not consider whether such stay would have been warranted if applied for.

3. The joint venture agreement

Following the agreement between plaintiff and defendant and before the formal contract had been executed, plaintiff, for the purpose of financing the construction of the buildings, planned to assign the contract to a partnership composed

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of its stockholders and two other persons who were to assist in the financing. The Atomic Energy Commission refused to approve the transfer and as the contract forbade the assignment without the consent of the Commission, plaintiff had to arrange other means of financing. This was done by a joint venture agreement on the part of those who would have composed the partnership. Under this agreement, it was provided that the plaintiff corporation go forward with the contract but that the profits therefrom be divided among the joint venturers who were to help finance it in certain proportions, and that they should control the policy and conduct of the business in accordance with their interest in the undertaking, but would indemnify the company for any loss which it might sustain in following their direction over its dissent. The defendant learned of this agreement sometime before the termination of the contract as to all of the buildings, and notwithstanding such knowledge continued to do business with plaintiff corporation, having it continue the business of renting the buildings, requiring it to remove them when the contract was terminated, giving it notice of the termination and paying large sums of money to it.

It is perfectly clear, we think, that the contract was not assigned to the joint venturers and that its performance was in no wise affected by the fact that this method of financing was adopted. It amounted to no more than giving those who financed the performance of the contract a share in the profits and a control over the actions of the corporation which they would not otherwise have had. Defendant was protected by the provisions

of the contract, which were not modified in any way. There was no violation of the anti-assignment provision or any other matter of which defendant can complain; and defendant does not seem to have thought that there was any ground of complaint on this account until it was seized upon in an attempt to escape liability. The trial judge summed up the matter in the following language, which we think is amply sustained by the record, viz:

> The instrument states that it is not intended to be an assignment of the du Pont contract and it appears on its face to be an agreement by the plaintiff to share profits which it might have in its hands at the completion of the contract (or the losses) with those persons who were contributing capital and credit toward its performance of the du Pont contract. Its primary purpose was to permit Mr. C. G. Fuller of Barnwell, S. C., who was not a stockholder in Lyles & Lang but who contributed $100,000 and credit to the plaintiff for use in the dormitory enterprise only, to share in the possible profits from the contract, and similarly to permit additional risk capital to be contributed by certain of the plaintiff's stockholders in the dormitory enterprise without having profits thereon taxed to both the corporation and the stockholders. Du Pont's representatives not only knew from the beginning that such a profit sharing arrangement was contemplated but they actually furthered it by assisting the plaintiff in efforts to obtain a bank loan to a proposed partnership to consist of the same parties that later comprised the Joint Venture.

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> The Joint Venture Agreement does not purport to substitute for the plaintiff's obligations to the defendant the obligations of any other party. Certainly there was in fact no substitution of obligation. The contract with the defendant was completely performed by the plaintiff; none of the other Joint Venturers has sought to perform, interfered in any manner with the performance, claimed any interest under the contract, or made any claim against the defendant. I find that the existence of the Joint Venture Agreement has not affected plaintiff's performance of the contract in any respect and that the defendant has not been prejudiced by it.

4. Inclusion in cost of services rendered by corporations controlled by the joint ventures

The Architectural and Engineering services on the project were rendered by a corporation controlled by one of the joint venturers who was a stockholder in plaintiff. The supervisory services in the dormitories were rendered by another corporation controlled by another joint venturer and stockholder. Legal services were rendered by a law firm whose members were stockholders and joint venturers. Defendant contends that these charges should not be included in costs. The trial judge found with respect to all of them that they were regularly incurred in the performance of the contract, that they were necessary thereto, were reasonable in amount and were fixed by firm contracts. In such situation we see no reason why the services should not be compensated. They were unquestionably necessary to the project and the fact that they were rendered by

persons connected with the enterprise is no reason that they should not be paid for. At the time the services were rendered and the contracts made under which they were to be compensated, there was no thought but that they would fall upon plaintiff; for no one anticipated a termination of the contract in advance of one year of occupancy, and only in that event would plaintiff be entitled to reimbursement for costs. In providing for reimbursement on such termination, the contract provided against reimbursement for the time and services only of Dan D. Lang and John T. Lyles, although defendant knew that there were other stockholders. While services rendered by stockholders and other interested persons to a contractor under a cost plus contract should be carefully scrutinized, we see no reason to disturb the findings of the trial judge with respect to those here involved, and concur in the portion of his opinion wherein he said:

> In all cost-plus contracts there is always a danger of the contractor padding his costs at the expense of the owner and thus increasing his own profit. Especially is this danger present when materials and services are furnished by a stockholder or other person affiliated with the contractor. I find such a possibility extremely remote in the present case because of the manner in which this contract developed. At the time of the making of the contracts for the services here, the plaintiff had no reason to believe that the defendant would ever be called upon to pay for the services or for any of the other costs. It had every reason to believe that the debts which it was incurring would remain solely its own

obligations and it was therefore to its interest to keep them as low as possible. The testimony of both the plaintiff's and the defendant's witnesses is that there was never any actual thought that the dormitories would not be needed for at least a year. After the first year's operations the plaintiff's costs would become of no concern to anyone because the contract provided that on a termination after one year the plaintiff's reimbursement would be under a cancellation table which applied without reference to the plaintiff's costs. The du Pont representatives, during the negotiation of the contract and the early periods of its performance, made frequent representations to the plaintiff that many more bachelor accommodations than the 7,500 provided would be needed. The contract was originally for a two year term and it was at du Pont's insistence that the option for a third year was added. With such an optimistic atmosphere prevailing, it is hardly to be believed that the plaintiff would make contracts for services at excessive costs, and thus reduce its own profits, on the remote possibility that the project might be terminated within a year and du Pont would have to pay the costs.

5. The 20% allowance for overhead and profit

Section 3 of the contract provides for its termination. Subsection (a) relates to termination for cause and admittedly has no application. Subsection (b) provides for termination for convenience of the Commission, and, because of its importance to the question here under discussion and to the question as to breach discussed hereafter, we quote it at length as follows:

(b) Termination for Convenience of Commission. This Agreement or any part thereof may be terminated by du Pont subject to the approval of the Commission, for the convenience of the Commission. Any such termination shall be effective upon thirty (30) days' written notice by du Pont to the Operator setting forth the extent to which performance under this Agreement is to be terminated and the date upon which such termination becomes effective, in which case du Pont will pay the Operator a Lump Sum to be determined in accordance with the following table on the basis of the number of buildings ready for occupancy on the date of termination. By payment of such amount or amounts, du Pont will thenceforth be relieved of any further obligations under this Agreement, with respect to the building or buildings terminated.

(We omit here the lump sums guaranteed to be paid for termination during the second year of occupancy, beginning with $30,030 per building after 12 months of occupancy and decreasing at the rate of $2,502.50 per building per month during the succeeding 12 months period.)

In the event of termination of this Agreement on one or more of said dormitory buildings prior to twelve months following the date of occupancy of such building or buildings, du Pont shall pay the Operator a sum equal to the actual costs that have been incurred by the Operator in connection with such building or buildings plus twenty per cent (20%) of such actual costs for overhead and profit. Actual cost as used herein shall be defined as all out-of-pocket expenses that have been incurred

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by the Operator in connection with such building or buildings up to the date of termination, including, but not limited to, the acquistion of land, construction, furnishings, operation, and maintenance together with the net costs required to settle any outstanding obligations that may have been incurred up to the date of termination but not including any costs for personal time or services rendered by the principals of Lyles and Lang Construction Company (Operator) to wit: Dan D. Lang and John T. Lyles. This settlement will be subject to recognized audit procedures mutually satisfactory to both du Pont and the Operator and the mutually agreed value for the building or buildings, the value of land acquired and net rental accruals to date of termination will be deductible from the actual cost determination.

One of the questions raised by the appeal is whether the 20% allowed for overhead and profit on termination of the contract prior to twelve months following the date of occupancy should be computed on cost prior to the deduction of the value of land and buildings and rent accruals, as held by the judge below, or whether the computation should be made after these items have been deducted. With respect to this matter, we think that, in the light of the surrounding circumstances, there is ambiguity as to the proper meaning of the contract, and we agree with the judge below that the ambiguity should be resolved by applying the 20% before the deduction is made for the deductible items. As he said in his opinion:

> I am unable to discern any logical purpose which would have led the parties to

agree that the plaintiff would not be entitled to its profit and overhead upon that portion of its costs which might be offset by salvage and rental income. The obvious purpose of the deductions is to keep the contractor from being paid for something and then allowed to keep it. That purpose is accomplished by making the deductions from the total that it is to receive under the contract. To make the deductions and give the contractor its profit only on what might be left would have no business justification and could have the effect of causing the contractor a loss after satisfactory and economical performance on its part. Du Pont recognizes that this obviously unintended result was possible in its letter of December 19, 1952, to the Atomic Energy Commission (P's Ex. 44), which I shall refer to later. Certainly such a punitive interpretation of the contract should not be adopted if a fair interpretation is possible.

It must be remembered that, if things had developed as intended, plaintiff was not constructing the buildings for defendant but for itself. Defendant was not paying for them, but guaranteeing for a two year period, rentals amounting to $3,217,000 per year, with provision that at the end of the contract the buildings should be torn down. It was understood that, while plaintiff would be required to make large expenditures, defendant might not need the buildings for the term of the contract and for that reason provision was made for termination. If this should occur after the buildings had been rented for just a year, the plaintiff might keep everything received up to that time and would be paid in addition $30,030 per building or a total on the 75

buildings of $2,252,250. If the termination occurred before the end of the first year, plaintiff was to be reimbursed for its out of pocket costs incurred under the project with an allowance of 20% to cover overhead and profit. It was reasonable that against this cost plus overhead and profit the plaintiff should credit salvage and rentals received. It would not have been reasonable to require that these be credited against out of pocket costs before the addition of the 20%; for such requirement might result in denying to plaintiff the right to recover overhead expense on the project as well as any profit, and it is hardly possible that a provision fraught with such possible hardship to plaintiff should be made part of a termination provision inserted for the benefit and convenience of the defendant.

In a proposal of August 28, 1951, plaintiff used language supporting defendant's interpretation of the contract, but this was in conflict with the terms of a prior proposal. Defendant realized that this conflict existed and in its letter of August 28, awarding the contract to plaintiff, conditioned the award upon plaintiff's supplementing its proposal by letter, which should contain among other things: "2. further definition of cost to which the 20% applies, on the portion regarding termination during the first twelve (12) months of operation." On August 29, plaintiff, in response to this letter of August 28, wrote a letter covering this matter and suggesting the language for section 3(b) of the contract which stated clearly that the 20% was to be applied before and not after the deductions which were provided for.

Defendant made no objection to the language so proposed and when the formal contract was submitted and signed some months later, the representative of plaintiff was told by the representative of defendant that the language therein employed had the same meaning as that proposed by plaintiff. All of these matters were properly considered as bearing upon the proper interpretation of the contract. *Progressive Furniture Co.* v. *Stoneville Furniture Co.,* 4 Cir. 192 F. 2d 869.

Another matter which throws light on the interpretation placed on the contract by the parties is a letter of December 19, 1952, by the Assistant Manager of defendant to the Manager of the Savannah River Operations Office of the Atomic Energy Commission, in which he used the following language:

> The basic agreement between du Pont and Lyles and Lang provides that Lyles and Lang will construct and operate the defined facilities at their expense and that du Pont in turn guarantees income for a specified period of time. It was further the intent of the parties that in the event of cancellation for convenience Lyles and Lang would recover all of their costs plus a profit.
>
> In an effort to avoid the nuisance and expense of salvage proceedings in the event of a cancellation for convenience the wording of Section 3 was unfortunately and unintentionally constructed in such a manner that it could be interpreted that the 20% representing overhead and profit be applied at the net level.

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> Application of such an interpretation to actual costs as reflected in the attached tabulation would result in little or no profit to the operator. We cannot support such a position as reflecting the intention of the contracting parties. It should be noted that the attached tabulation does not include Barnwell costs.
>
> Regardless of legal or accounting opinions that may attempt to define the intent of the parties, those of us who participated in the negotiations must state that the principles outlined in this letter represent the proper understanding between the parties and our computation represents the approximate minimum payment to Lyles and Lang that we could conscientiously defend in legal action.

Attached to this letter was a statement showing the deduction of $102,500 for land and buildings before but the deduction of $799,263.88 income from rent *after* the computation of the 20%. The important deduction, of course, is that of income from rent; but it is clear from the contract that the deduction of land and buildings falls in the same category.

6. Are costs attributable to more than one building chargeable as costs under the contract or must they be eliminated as overhead?

The contention of defendant is that costs attributable to the entire enterprise, such as legal fees, interest on borrowed money, architect's and engineering fees, auditors' fees, etc., should be excluded from the computation of cost under the contract and absorbed as overhead by plaintiff. We think this a strained and unnatural construc-

tion; for we can see no reason why items which would be treated as cost under a contract for constructing a single building should not be so treated under a contract for constructing 75 buildings. They were so treated by the defendant when it was agreed at a conference on March 6, 1952, that only the costs incurred by plaintiff at its Leesburg Road or Home Office, i. e., costs applicable to its general business, should be treated as overhead which plaintiff was to absorb under the contract. Shortly after this conference, plaintiff began sending invoices to defendant for its costs at the Beech Island project which had been terminated, included in which were a proportionate part of the costs now challenged as overhead, and defendant paid them in the total amount of $58,000. Defendant's contract supervisor and accounting department approved the payment. It was later recouped by deduction from a rental check, but this was not on the ground that the items constituted overhead but that they were not properly supported.

A circumstance showing that the items here under consideration were not to be treated as overhead was a supplemental agreement of December 6, 1951, amending the provision relating to termination for cause and providing that in the event of such termination, architectual, engineering or legal fees should be excluded from out of pocket costs. There would have been no reason for such a provision if, without it, such fees were to be treated as overhead under the contract.

The trial judge went to the heart of the question presented in the passage of his opinion in which he said:

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> The defendant concedes that general labor and material costs may properly be allocated among several structures. There is no reason why a similar allocation cannot be made of an architect's fee when the services were rendered, presumably equally, on a number of identical buildings under one contract. Actually, there is no need for any allocation here between buildings or between sites. To use the accountant's term, we have one "product" here and that is the construction and operation of the entire group of dormitories. Any charge which goes into any one of the dormitories goes into the group and when the entire group has been terminated, any charge which went into any one of the dormitories is reimbursable.

As said by Judge Hamilton in *Grand Truck Western Ry. Co.* v. *H. W. Nelson Co.*, 6 Cir. 116 F. 2d 823, 839, cert. den. 297 U. S. 717: "These (overhead expenses) are not definable with precision but may be said to include broadly the continuous expenses of the business, irrespective of the outlay on a particular contract." See also *Glenn L. Martin Co.* v. *United States*, 4 Cir. 100 F. 2d 793, reversed 308 U. S. 62; *Simmons* v. *Colonial Press*, 1 Cir. 126 F. 2d 341, 350, *Alfred Bell & Co., Ltd.* v. *Catalda Fine Arts, Inc.*, 86 F. Supp. 399, 415, modified and affirmed 2 Cir. 191 F. 2d 99.

7. Breach or termination of contract

The learned trial judge was of opinion that termination of the contract as to any building was not authorized under the contract until the building had been completed and accepted for

occupancy. In this we think there was error. Under the language heretofore quoted there could be termination of the contract for the convenience of the Commission, and there was no limitation upon the right to terminate except the requirement of 30 days' written notice. A lump sum guarantee was provided for termination after 12 months occupancy and a cost plus basis of compensation was provided "in the event of termination * * * prior to twelve months following the date of occupancy", but nowhere was there any provision requiring that a building be completed and accepted for occupancy before the right to terminate would arise and we think it unreasonable to place any such interpretation upon the contract. The right of termination was inserted to protect against the burdensome guarantee in the event it should develop that the buildings were not needed; and if this appeared before construction or acceptance there was every reason why the cost of construction should be avoided or minimized by terminating the plaintiff's obligation to construct. No useful purpose could be served by requiring the construction of a building which was not needed—by requiring plaintiff to incur additional costs of construction in order that defendant might be required to pay additional amounts under its guaranty. A case directly in point, we think, is the recent decision of this court in *Reconstruction Finance Corp.* v. *Sherwood Distilling Co.*, 4 Cir. 200 F. 2d 672, 675, where the court, speaking through Judge Dobie, said:

> The District Judge also stressed the clauses in the contract giving Sherwood

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> the right of purchase and then stated "We believe that when those provisions are read in relation to the entire agreement, they contemplate the giving of the options only upon the plant as a completed structure." With this interpretation of the termination clause of the contract, even when read in the light of the entire contract, we cannot agree. This termination clause is absolute and unconditional on its face. We find nothing in the other clauses of the contract which would justify us in *adding* to the termination a *new* limitation that the right to terminate (by either party) could be exercised *only after the completion of the project.* To say (as apparently the District Judge says) that immediately before the completion of the project neither party could terminate; but that, immediately after the project's completion, either party could terminate, seems to us a strained and unreasonable interpretation of the contract.

We think it just as unreasonable to say here that, although defendant could terminate the contract as to any building immediately upon its completion and acceptance, it could not exercise the right to terminate before that time but would have to allow the construction of a building which it knew that it would not use.

And we do not think that the notice of termination was void on the ground that 30 days' notice as required by the contract was not given. On February 7, 1952, plaintiff was duly notified to suspend operations at the Beech Island site. On March 5 a letter of termination was sent, terminating the contract as of March 7. The letter of February 7 served all the purposes of a letter

of termination, in giving plaintiff notice not to incur further expense at Beech Island. If, however, it was not sufficient, the only effect of the insufficiency was to extend to April 4 the effective date of termination, and there is no evidence of any damage or inconvenience resulting from the delay. The plaintiff is entitled to recover with respect to Beech Island on the same basis as for termination at other sites, i. e., costs incurred plus 20% thereon for overhead and profits less the value of land and salvage of materials. As no buildings were completed and accepted for occupancy at the site there could be, of course, no deduction on account of rents.

8. Interest

The trial judge allowed interest at the legal rate on the amount found to be due, commencing as to each site 30 days after the date of termination, on the theory that the claim of plaintiff was a liquidated claim within the meaning of the rule as applied by the South Carolina decisions cited in his opinion. We do not think, however, that the amount for which defendant was liable on the termination of the contract was either liquidated or determinable with sufficient certainty to bring it within the rule of these decisions. There was dispute as to whether some items were includible in costs under the contract, as to the proper amount of the items if includible, and as to whether the 20% override was applicable before or after deductions. Litigation was just as necessary to determine the amount due under the contract as it would have been in the ordinary

case to determine damages for breach. In this situation, we think that the rule applicable with respect to interest is that applied in computing damages for breach, i. e. that interest may be awarded by the trier of facts to compensate plaintiff for the loss sustained as the result of delay in receiving the amount to which he is held to be entitled. The subject was fully covered by this court in *Railroad Credit Corporation* v. *Hawkins*, 4 Cir. 80 F. 2d 818, 825–826, cert. den. 298 U. S. 667, where we said:

> Interest is awarded in any case where it is not covered by express contract, because such award is necessary to place the injured party in the position which he would have occupied if the party in default had fulfilled his duty in the premises. As said by the Supreme Court in *Miller* v. *Robertson*, 266 U. S. 243, 257, 45 S. Ct. 73, 78, 69 L. Ed. 265: "Compensation is a fundamental principle of damages, whether the action is in contract or in tort. *Wicker* v. *Hoppock*, 6 Wall. 94, 99, 18 L. Ed. 752. One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Curtis* v. *Innerarity*, 6 How. 146, 154, 12 L. Ed. 380. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. *Spalding* v. *Mason*, 161 U. S. 375, 396, 16 S. Ct. 592, 40 L. Ed. 738."

> For cases illustrating how the principle of awarding interest to afford adequate compensation for the withholding of money justly due has been applied under varying circumstances, see *United States* v. *Creek Nation*, 295 U. S. 103, 111, 55 S. Ct. 681, 79 L. Ed. 1331; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306, 43 S. Ct. 354, 67 L. Ed. 664; *Brame* v. *Keystone Credit Corporation*, 4 Cir. 76 F. 2d 328, 331; *Standard Accident Ins. Co.* v. *Simpson*, 4 Cir. 64 F. 2d. 583, 589; *New Amsterdam Casualty Co.* v. *United States Shipping Board, etc.*, 4 Cir. 16 F. 2d 847, 852. And that the principle of awarding interest by way of affording adequate compensation where there has been default in the payment of money due is one of great antiquity, and recognized by the Roman Law. See Buckland Roman Law 2d ed. 551.

See also *St. Paul Mercury Indemnity Co.* v. *United States*, 10 Cir. 201 F. 2d 57, 62, where the court, speaking through Judge Phillips, said:

> Even though the exact amount due was not determined until the amount of credits was arrived at, the court, in the exercise of its sound discretion, could award interest or its equivalent as an element of damages. In *Concordia Ins. Co. of Milwaukee* v. *School District No. 98*, 282 U. S. 545, 554, 51 S. Ct. 275, 278, 75 L. Ed. 528, the court said: "* * * even in a case of unliquidated damages, 'when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages.' "

In as much as interest is awarded, however, as a means of arriving at the fair compensation

to which plaintiff is entitled under the contract, the interest should be computed not at the legal rate fixed by statute but at the rate plaintiff would have had to pay upon a loan of a similar amount, considering the state of the money market and the rate charged by banks for the use of money. As we said in recent case of *C. & O. R. Co.* v. *Elk Refining Co.*, 4 Cir. 186 F. 2d 30, 35, which dealt with the inclusion of interest as an element of damages for the destruction of personal property:

> The reason underlying the award of damages for damage to or destruction of property is the same as that which applies in awarding damages or compensation in eminent domain cases, viz., to give the injured party full compensation for the loss that he has suffered: * * *. We do not think, however, that plaintiffs are entitled to the legal rate of interest provided by statute but merely such as will compensate them for the delay in recovering damages when consideration is given to the state of the money market at the time. We think that, under the circumstances here, they will be adequately compensated by an award of 3 per cent for the period to judgment.

Many matters were discussed in the opinion below, which it is not necessary to deal with here. It is sufficient to say that we approve the decision below except with respect to the holding as to right of termination and breach at Beech Island and damages awarded on account of such breach and with respect to the rate of interest allowed. The judgment is accordingly

affirmed except as to these matters but is reversed as to them and the case is remanded for further proceedings not inconsistent herewith.

Affirmed in Part
Reversed in Part
and Remanded with Directions.

United States Court of Appeals for the Fourth Circuit

No. 6852

E. I. DU PONT DE NEMOURS & COMPANY, AND UNITED STATES OF AMERICA, APPELLANTS

vs.

LYLES & LANG CONSTRUCTION COMPANY, APPELLEE

Judgment filed and entered February 2, 1955

Appeal from the United States District Court for the Eastern District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed except with respect to the holding as to right of termination and breach at Beech Island and damages awarded on account of such breach and with respect to the rate of interest allowed and, as to these matters, it is reversed; that this cause be, and the same is hereby, remanded to the United States District Court for

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the Eastern District of South Carolina, at Columbia, for further proceedings not inconsistent with the opinion of the Court filed herein; and that the costs on appeal be divided.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.
MORRIS A. SOPER,
United States Circuit Judge.
ARMISTEAD M. DOBIE,
United States Circuit Judge.

Supreme Court of the United States

OCTOBER TERM, 1954

No. ——

E. I. DU PONT DE NEMOURS & COMPANY,

PETITIONER

vs.

LYLES & LANG CONSTRUCTION COMPANY

Order

Upon consideration of the application of the Solicitor General, on behalf of the petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 11th, 1955.

EARL WARREN,
Chief Justice of the United States.

Dated this 30th day of April 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

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HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1954

No. 785

E. I. du PONT de NEMOURS & COMPANY, PETITIONER,

versus

LYLES & LANG CONSTRUCTION COMPANY,
RESPONDENT

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Supreme Court of the United States

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No. 785

E. I. du PONT de NEMOURS & COMPANY, PETITIONER,

versus

LYLES & LANG CONSTRUCTION COMPANY,
RESPONDENT

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

The respondent prays that the Court deny the petition for certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered February 2, 1955.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unreported. It is printed (1 R. 1-37) in the appendix record in the Court of Appeals filed in this Court by petitioner. The opinion of the Court of Appeals is reported in 219 F. 2d, 328. It is printed in the appendix to the petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1). The judgment of the Court of Appeals was entered on February 2, 1955.

QUESTIONS PRESENTED

1. Does the "disputes clause" of the contract require that the factual findings of the Courts below be set aside and the issues submitted to the plant manager of the AEC's Savannah River Plant for decision?

2. Was the contract vitiated, under its anti-assignment clause, by the joint venture agreement?

3. Did respondent, in the course of the performance of its contract with du Pont, have the right to rely upon du Pont's administrative interpretations of the contract and du Pont's waiver of possible breaches?

STATEMENT

The contract here, awarded to the respondent by du Pont in its capacity as the independent contractor building the Savannah River Plant for the Atomic Energy Commission, was for the construction and operation by the respondent of a group of dormitories to house 7,500 workers at sites adjacent to the plant. The respondent was to receive a rental of $8.25 per man per week and 100% occupancy was guaranteed by du Pont for a two-year period, with the option in du Pont to extend the operations for a third year. Because of construction economies effected by the respondent, these guaranteed rentals would have yielded a profit of approximately $1,400,000.00 had the operations gone on for the full two years, but the demand for dormitory rooms envisioned by du Pont and the AEC failed to materialize and there was a series of terminations: 1,500 units at Williston, S. C. after seven months of operation,

1,500 at Allendale, S. C. after eight months, and 1,500 units at Barnwell, S. C., just before the expiration of twelve months. 3,000 units proposed for a fourth site, at Beech Island, S. C., were terminated before the dormitories were constructed.

The contract provided that upon such terminations "for the convenience of the Commission" within the first year of operation, the respondent was to receive, in lieu of all other compensation, its out-of-pocket expenses plus 20% thereof for profit and overhead less the rentals which it had already received and less the salvage value of the land and buildings. After some termination payments had been made by du Pont, serious differences arose between the parties as to the construction of the contract and this litigation became necessary.

The respondent's action (1 R. 37) was for the recovery of its costs incurred at the several sites prior to the terminations plus 20% of those costs for overhead and profit and, as a separate cause of action, for damages on account of du Pont's breach of the contract in terminating the Beech Island dormitories before they were constructed, it being the respondent's position that the contract provided for termination for convenience only after the "date of occupancy" of the various dormitories and that the premature termination at Beech Island deprived it of the minimum profit which it had bargained for, *i. e.*, 20% on the whole of the construction costs.

Du Pont's answer (1 R. 59-63) set up numerous defenses and a counterclaim for the recovery of all moneys which the plaintiff had received in the transaction, the latter upon the theory that there had been an assignment of the contract to a joint venture in violation of a provision of the contract and of Revised Statutes, Section 3737. Other defenses set up by the defendant were that the disputes

clause of the contract barred the action; that the plaintiff was entitled to its 20% profit only on the difference between its costs and its receipts from rent and salvage; that some of the plaintiff's claimed costs constituted "overhead" which must be absorbed in the 20%; that there could be no recovery of costs incurred for services rendered by members of the joint venture in excess of the actual cost of the services to the venturers; that certain of the charges were unreasonable in amount; and that interest was not recoverable. Specific attacks were made by the defendant upon some sixteen different categories of the costs sought to be recovered.

A motion by the defendant for judgment on the pleadings under its disputes clause defense and a motion to eliminate from the trial all issues claimed by the defendant to constitute disputes of fact were overruled by the Court in its order of July 7, 1953 (1 R. 106); and, after considerable discovery procedure, the cause came on for trial on its merits. The issues, both factual and legal, were thoroughly presented to the District Court. The typewritten transcript is 1193 pages in length and 88 exhibits were introduced. The defendant was represented in both the District Court and the Court of Appeals by Government counsel, who, on the last day of the trial (2 R. 555, 558), conceded that the respondent was entitled to recover in *quantum meruit* if the contract was voided by the joint venture agreement.

In a full decree dated May 7, 1954 (1 R. 1-37) the District Court disallowed certain items of recoverable costs but basically sustained the plaintiff's position, including its claim for damages on the Beech Island termination. Judgment was allowed in the amount of $854,614.50.

Du Pont and the United States appealed to the Court of Appeals for the Fourth Circuit. That Court in a unanimous opinion written by Judge Parker reversed the

award of damages for the claimed breach of contract in the Beech Island terminations,[1] reduced the rate of interest allowable before judgment and affirmed the remainder of the judgment.

The decree of the District Court, as modified by the Court of Appeals (1 R. 36, App. to pet., 25a-28a) and omitting interest, awards judgment according to the following calculation:

Total construction costs at all sites		$ 2,025,951.22
Total operation costs		404,235.46
Total costs of Lyles & Lang		$ 2,430,186.68
20% for overhead and profit (cost of community buildings eliminated)		470,284.56
Total due before deductions		$ 2,900,471.24
Deduct:		
Salvage of buildings & material	$ 131,081.39	
Agreed value of land	43,095.40	
Rental & miscellaneous income	1,440,843.82	$ 1,615,020.61
Balance payable		$ 1,285,450.63
Payments		613,412.11
Balance due		$ 672,038.52

[1] Lyles and Lang has filed a conditional cross-petition (No. 762, this Term) for a writ of certiorari to review this holding in the event that a writ is granted on the present petition.

REASONS FOR DENYING THE WRIT

I

The Disputes Clause Question

1. Both of the Courts below (1 R. 106, App. to pet., 8a-12a) held as a matter of law that the disputes clause of the contract (Section 11, 3 R. 568) had no application to the issues in this case. In this they were clearly correct. The clause applies only to "disputes concerning questions of fact arising under this agreement." It is true that factual findings by the Courts below were necessary for a solution of the basic issues in the case. Such matters as the amount of the respondent's expenditures and the salvage value of the buildings are factual in nature; but none of those findings had any importance in and of itself. None fixed the rights of the parties. The only relevance of any factual finding was as a necessary ingredient in a dollar and cents calculation of what, if anything, the plaintiff was entitled to under a proper construction of the contract.

2. The holdings below are in accord with the decision of the Court of Appeals for the Eighth Circuit in *United States v. Duggan*, 210 F. 2d 926, 932, that such disputes clauses in construction contracts have application only to disputes arising "during the course of the performance of the contract and prior to its termination." The decision of the Court of Claims in *Penker Construction Company v. United States*, 90 Ct. Cl. 1, is to the same effect. These cases declare that the clear purpose of the clause to avoid delay in Government construction is demonstrated by the requirement that pending the settlement of the dispute "the Operator shall diligently proceed with the work as directed." No decision has been found applying a disputes clause, in the language of the Court below, to "provide for unilateral determination of the amount due under the contract upon its termination." (App. to pet., p. 10 a.)

In *United States v. Blair*, 321 U. S. 730, this Court recognized that the disputes to which such clauses were intended to apply were those arising during the course of performance by saying (321 U. S. 730, 735) that the clause "provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers."

3. The holdings below are not in conflict with any decision of this Court. In *United States v. Holpuch Co.*, 328 U. S. 234, *United States v. Blair*, 321 U. S. 730, and *United States v. Callahan Walker Co.*, 317 U. S. 56, the cases relied upon by petitioner (Pet. pp. 16-21), the disputes held subject to administrative action arose during construction, pertained to the construction itself, and were subject to a decision determinative of the full rights of the parties. In *Holpuch* the disputes were "as to excavations for footings and as to increased wages ordered to be paid to respondent's bricklayers." In *Blair* the dispute concerned payment for extra labor and material which the construction superintendent had required the contractor to provide during the course of construction.

The contract language was also different. In both *Holpuch* and *Blair*, the disputes clause was not confined to questions of fact but covered all disputes, whether of fact or of law. In *Callahan Walker* the disputes clause applied by its own language only to disputes of fact but there was a separate clause which provided that when the contracting officer issued change orders and the contractor was not satisfied with the "equitable adjustment" which the contracting officer made in the contract price on account of the change, the dispute as to the proper adjustment was to be settled under the disputes clause. To be analogous, our contract in the present case would have to provide that the contractor's final compensation should be determined

by the X.Y.Z. plant manager, with all controls thereafter, whether factual or legal, subject to the disputes clause appellate procedures.

6. It must be borne in mind that the Court in these disputes clause cases is not applying a fixed rule of law or giving effect to a statute but is merely seeking to determine what the particular contracting parties intended in each case. This case, and obviously the intent the clause to apply to disputes in one setting without intending it to apply to disputes in all settings. The District Court in the present case said (1 R. 1344):

> "I cannot find in Section 11 of the present contract any indication that the parties intended that if one of them had to go to court for a determination of his rights under the contract he would not be entitled to a full determination of those rights."

A judicial determination of the legal issues between the parties was necessary and the design of a prompt and efficient administration of justice demanded a settlement of all issues at one time and by one tribunal. Nothing would be settled between the parties until there was a decision, which only a court could give, of whether there had been an invalidating assignment of the contract, or whether the 20% profit factor was to be applied before or after certain deductions were made from the plaintiff's costs, of whether the incidentals were certain charges made by persons associated in the joint venture, and of whether certain charges were required by the contract to be treated as "overhead". The defendant desired an adjudication of these questions just as much as the plaintiff did, for its secret and unauthorized personal enjoyment rested on the plaintiff's [illegible] decision of what it claimed was an illegal assignment of the contract. If no such issue had been [illegible] decision process, determination of the actual controversy would have been a [illegible]

and one certainly not within the reasonable contemplation of the parties, for the Court to hold them in abeyance while related factual issues were presented to the AEC plant manager for decision *in camera*, appealed to a Washington board and brought back to the District Court upon the question of whether the administrative findings were "supported by substantial evidence" under the test of the so-called "Wunderlich Statute" (41 U. S. C., Sec. 321).

Under the petitioner's contention, either the whole case must be reversed for that to be done on a second trial or this Court must now separate the factual issues from the legal, preserve the legal rulings in some fashion and require the making of administrative factual findings to be eventually substituted for those made by the Courts. Since the petitioners are not seeking to appeal from the factual findings below, the Court must consider them as correct. Presumably any administrative findings would also be correct and therefore identical with those now in the record. Delay might be the only result.

The statement in the *Wolpack* case which petitioner cites upon (Pet. p. 17) is that a contractor may not "choose without due cause to ignore the provisions" of a disputes clause. A contractor has "due cause" to take a controversy to Court when only a Court can settle it. It cannot be said that by "choosing to ignore" the clause when the legal position that his opposite party is taking would deny him the right of any recovery under the contract regardless of what findings are made administratively.

3. Even if the Court should grant the writ, it ought not reach the question of whether the disputes clause is applicable because both Courts below found as a fact that the defendant waived its right to rely upon it. (I R. 169, 2; App. to pet., p. 11a.) The waiver is well established in the record. Its Post never suggested that the issues between

it and the plaintiff be referred for decision under the disputes clause. Instead, the plaintiff's representatives were told that the AEC should *not* be brought into the discussions (2 R. 177-8, 208-9). Exhibit 29 (3 R. 595) is a memorandum prepared by du Pont reciting that at a conference held on November 12, 1952, the Lyles & Lang representatives were told that if they "did not feel they could settle within the bounds set forth, that they would have to resort to legal action." The respondent's attorney testified (2 R. 177) that the statement was made to him.

With the factual findings of waiver so amply supported in the record not only in these respects but also, as Judge Parker emphasizes, in the defendant's insistence upon a judicial decision of the defenses raised in its Answer and Counterclaim, this is not an appropriate case for a determination of the applicability of the disputes clause. Concurrent findings by two courts will be accepted by the Court as final in the absence of an exceptionally strong showing of error. *Comstock v. Group of Institutional Investors*, 335 U. S. 211. It will not grant a writ to review the determination of issues of fact. *General Talking Pictures Corp. v. Webster Electric Co.*, 304 U. S. 175; *United States v. Johnston*, 268 U. S. 220.

II

The Assignment Question

1. The Courts below were correct in holding that the joint venture agreement of December 17, 1951, did not constitute an assignment of the contract. The agreement (Ex. Z, 3 R. 625) specifically provided in paragraph 5 (3 R. 633) that it was not an assignment of the du Pont contract. Its purpose (as both courts below have held factually, App. to pet., pp. 12a-15a) was to permit a sharing of the profits which might be derived from the contract with those per-

sons who had contributed risk capital to the dormitory project. It had no effect whatsoever upon the respondent's performance of the contract with du Pont. None of the joint venturers has interfered with the performance or claimed any interest in the contract. The respondent alone has fully performed and its performance has been accepted by du Pont.[2]

2. The decisions of this Court and of other Federal Courts support the holdings below. In *Hobbs v. McLean*, 117 U. S. 567, the Court held that an agreement by a Government contractor to share his profits with another was not an assignment in violation of the anti-assignment statute (Revised Statutes, Section 3737, 41 U.S.C. Sec. 15) saying that the purpose of the statute "was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." Cf. *Thompson v. Commissioner*, 3 Cir., 205 F. 2d 73.

United States v. Shannon, 342 U. S. 288, relied upon by petitioner (Pet. pp. 16, 22, 23), bears no similarity to the present case. The purposes which it lists (Page 291 of 342 U. S.) as supporting the anti-assignment statutes have no possible relevance to the claim of "assignment" here. All embody the avoidance of some possible handicap to the Government. We do not see how petitioner could be handicapped by an assignment which it never knew about. The Court of Claims has held, *Dougherty v. U. S.*, 18 Ct. Cl. 496, that an attempted assignment in violation of the statutes which the parties did not set up or claim under could not be asserted by the United States after performance by the assignor to prevent recovery.

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[2] Petitioner's claim, in footnote 18 at page 25 of the petition, that the respondent's officers admitted that the joint venture "took over" the performance of the contract rests upon an obviously incorrect reading of their testimony, as even a cursory examination of the record will demonstrate. (2 R. 330, 531-2, 536.)

3. That income tax returns were filed treating income from the dormitories and depreciation as belonging to the joint venture is of no consequence. Since one of the purposes of the joint venture agreement was to constitute the venture as the tax reporting agency, the returns would naturally be in that form. Under the holdings below, the joint venture agreement was an assignment of profits. The reporting of profits is the proper function of a tax return. Actually, "income" and "profits" have been unreal up to the present. All of the returns were on an accrual basis. No actual profits have been received by anyone. (2 R. 532.)

4. The legal question of whether there was an assignment of this contract would not be decided even if certiorari were granted because the Courts below have disposed of the contention that the contract was abrogated by holding that even if there was an invalidating assignment, this breach of the contract was waived by du Pont in demanding performance by respondent. Du Pont, and the AEC, received a copy of the joint venture agreement before the final termination, but did not then, or at any time until the answer was filed in the present suit, make any criticism of it or suggest that it violated the contract. As the District Court said (1 R. 7): "With knowledge of the joint venture agreement, the defendant thereafter negotiated many matters with the plaintiff, continued to do business with the plaintiff as in the past, wrote its letter of October 24, 1952 (plaintiff's Exh. 28) undertaking to pay the plaintiff $600,000.00 on account of the termination, paid $450,000.00 of that amount, accepted from the plaintiff performance of its duties under the contract and required the plaintiff to fulfill its obligations to demolish and remove the facilities." The Court of Appeals made similar findings (App. to pet. p. 13a). Such conduct constitutes a waiver. 12 *American Jurisprudence* 1029, 1031, Sections 447,

449 and cases cited. Having insisted upon performance of the contract by Lyles & Lang, du Pont cannot deny performance to Lyles & Lang.

The finding that there was a waiver of any breach of the contract by the joint venture agreement is another way of saying that the petitioner recognized that the joint venture agreement was **not** an assignment. The first indication to the contrary was when petitioner filed its answer in this suit. As Judge Parker said (App. to pet., p. 14a): "The defendant does not seem to have thought that there was any ground of complaint on this account until it was seized upon in an attempt to escape liability."

III

Legality of du Pont's Waiver

1. Recognizing the impossibility of avoiding the foreclosure of its two legal positions by the factual findings of waiver below, the petitioner poses a third question—whether such waiver by a Governmental independent contractor can ever be effective. This position amounts to saying that the respondent had no right to rely upon any statement, commitment or course of conduct on the part of du-Pont in administering the contract, although it was invited to deal with du Pont as the builder and operator of the plant, contracted with du Pont as the sole opposite party, knew only du Pont in the administration of the contract, and is bound by its own statements, commitments and conduct in the course of its performance to du Pont. If persons dealing with cost-plus contractors for the Government had to clear every detail of performance with the Government as well as with the contractor, it is doubtful that sufficient sub-contractors and materialmen for the accomplishment of Government work could be found.

The respondent did rely entirely upon what du Pont said and did in regard to the contract and the work to be done under it. For example, the letter of August 28, 1951, awarding the contract to respondent (Ex. 11, 3 R. 580-1) was from du Pont alone. The formal contract, which was the first document carrying AEC approval, was not executed until December 14, 1951, (2 R. 156); but the respondent had gone ahead to make large expenditures and practically complete the construction of the first 1500 units by the time the contract was signed (2 R. 162). That the formal contract and the supplements required AEC approval was of no importance to the respondent. It had never seen the du Pont-AEC contract. It had du Pont's promises and they were sufficient.

The ruling advocated by the petitioner would destroy the status of independence which cost-plus contractors now occupy under the law. Atomic Energy Acts, 42 U. S. C., Secs. 1804 (c), 2061; *Carson v. Roane-Anderson Co.*, 342 U. S. 232, 236. Cf. *Alabama v. King*, 314 U. S. 1. In contracting with du Pont for the construction and operation of this particular Savannah River Plant, the Atomic Energy Commission has bestowed an unusually high degree of independence in du Pont. Paragraph 15 of the contract (3 R. 617) provides that du Pont shall not be responsible for any loss arising thereunder unless such loss was "caused directly by bad faith or wilful misconduct on the part of some corporate officer or officers * * * of the company."

2. As a matter of fact, the Atomic Energy Commission participated in du Pont's waiver of the disputes clause and of the possible breach by assignment. The AEC plant manager testified (2 R. 387) that his office worked very closely with du Pont on this contract. AEC auditors went over the respondent's books (2 R. 388) and were familiar with

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the nature of the respondent's claims growing out of the termination, but the AEC never suggested resort to the disputes clause. The du Pont memorandum (Ex. 29, 3 R. 595-7) which recorded the fact that respondent's representatives were told by du Pont that if they could not "settle within the bounds set forth, that they would have to resort to legal action" shows that the "bounds set forth" refers to compensation limits to be agreed to between du Pont and the AEC. The same memorandum outlines a du Pont-AEC conference held on the same day with the AEC informed of the subject of the previous conference. It is clear here and throughout the record that the AEC was perfectly familiar with du Pont's negotiations with the respondent and acquiesced in them.

Specifically on the matter of the joint venture agreement, the record shows (2 R. 381-2, 386) that the AEC plant manager received a copy of the agreement when du Pont did and discussed it with du Pont but that he permitted du Pont to go on dealing with respondent and made no claim that the agreement deprived respondent of its compensation.

IV

GENERAL OBSERVATIONS UPON THE INAPPROPRIATENESS OF THE WRIT

1. The petition seeks to bring up for review by this Court a judgment which rests upon a great mass of interwoven legal and factual determinations by the Courts below. Although the questions sought to be reviewed underlie all that has been adjudicated in the cause and a reversal would put the parties back pretty close to where they started, a grant of the writ and a decision of the posed questions in favor of the petitioner could not conclude the controversy. A determination of what is due to the respondent will still be necessary. Only the method of the determination would

be changed with no indication at the present time that the respondent would be entitled to a different amount than it now has under the judgment below. With no more tangible results to the ultimate rights of the parties than those foreseeable under the petition, this application for a writ appears to be an effort to obtain rulings upon academic questions which can be of only slight value to the Government in future cases and which the respondent cannot afford to assist in litigating upon the present complex record while the whole of its capital and large amounts of borrowed funds remain tied up. (2 R. 161, 217, 299, 530.) Two Courts have decided the basic merits of the case in the respondent's favor and it should now be paid what has been due for almost three years.

To answer fully the inferences in the petition that respondent has already been adequately compensated for its construction and operation of the dormitories would require a complete reargument of all the issues argued below. When the petitioner states, at page 14 of the petition, that the respondent had received, before suit was brought, a total of $2,228,432.72 as against direct costs, "exclusive of challenged items", of $2,127,509.10, it must be remembered that the Courts below held against petitioner on those challenged items. On one ground or another it has challenged a great part of the respondent's costs. For example, on the one contention that certain expenses should be absorbed as overhead in respondent's 20% allowance, the petitioner eliminates a total of $298,000.00 from the recoverable costs. (See footnote 6 at page 9 of the petition.) Under the petitioner's calculation of the account, presented in an appendix to its brief in the Court of Appeals, the total amount which it would allow respondent for its overhead and profit is $86,744.93. In other words, it would have the respondent absorb an amount three and a half times the amount

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within which it is to be absorbed; and that still without regard for the fact that respondent had true overhead expenses during its performance of the contract which were not charged to the du Pont job, although that was the only job being done, of more than $90,000.00 (2 R. 222-3).

The calculation by the Courts below of the amount due (*supra*, p.) shows that the judgment includes over two hundred thousand dollars of respondent's actual out-of-pocket expenses. The remaining allowance of $470,284.56 is for respondent's entire profit and overhead for a year and a half period on a two and a half million dollar job. The respondent's compensation is most reasonable and the justice of the case is with it.

2. A concession was made by Government counsel representing du Pont in the District Court which of itself should make pointless a review by this Court of either the assignment question or the disputes clause question. That concession (2 R. 555, 558) is that respondent will be entitled to recover in *quantum meruit* if it should be held that the existence of the joint venture agreement bars its right to recover under the contract. The concession was repeated in the appellant's brief in the Court of Appeals (pp. 8, 39) and appears in the present petition, p. 27. The proper measure of *quantum meruit* recovery would be at least that allowed below on the contract, since the normal *quantum meruit* standard is the value to the defendant of the plaintiff's performance and the defendant here has agreed that the plaintiff's performance is worth its out-of-pocket expenses in performing plus 20% for profit and overhead. See *Restatement of the Law of Contracts*, Sec. 357. It is possible that a *quantum meruit* recovery would be higher than the recovery on the contract since the defendant received benefits in excess of the costs to the plaintiff. The plaintiff's material and labor costs were less than the de-

fendant's expert witness Stuck testified their proper value was. (2 R. 451-2.) The plaintiff's labor scale was lower than du Pont's would be for similar work. (2 R. 504-5.) The AEC plant manager testified that the Government saved money by having a private contractor do the work. (2 R. 381.)

The Court should not grant certiorari to decide whether there has been a prohibited assignment of the contract if the only effect of an affirmative answer would be to change the name of the plaintiff's right to recover an identical amount of money. The Court's refusal to take the case for that purpose would certainly be consistent with "substantial justice" within the terms of Rule 61 of the Rules of Civil Procedure, the spirit of which Rules is applicable in this Court.

Likewise on the petitioner's disputes clause argument, a grant of the writ for the purpose of deciding whether certain factual determinations should be made by administrative agencies rather than by the Courts in an action on the contract cannot be in furtherance of substantial justice between the parties when the petitioner has conceded that a determination of the same factual matters (*e. g.*, the value of salvage and the reasonableness of fees) may be made by the same Courts in an action on *quantum meruit*.

3. The Court said in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, —— U. S. ——, May 9, 1955, 23 L. W. 4195, that a writ of certiorari should not be granted unless there is something more involved than "the academic or the episodic." The questions sought to be presented here are both; academic because they do not touch the basic and practical rights of the parties, and episodic because they are not likely to arise again in any comparable situation.

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CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 18, 1955.